"No Jobs on a Dead Planet": At the Interface of Employment – Climate Change Law

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Abstract

As governments and companies begin to take actions to both mitigate and adapt to the existential threat of climate change, employment relations lawyers and academics must now take notice and prepare for the growing legal reality where climate change issues and employment relations are inextricably intertwined. This paper identifies key areas pertinent to this intersection and the ways it is currently being addressed locally and internationally. The paper explores the emerging concept of Just Transition as a developing analytical tool to better understand the varied actions and options that employment relations actors can take, as well as those being taken under the new climate change regime.

I. Introduction

Following the New Zealand Government's announcement banning all new future off-shore oil-exploration permits in line with its ambition to combat climate change, the future of Taranaki's mostly oil and gas-dependent workforce was thrown into a tailspin.[1] Those workers, as well as others across New Zealand facing similar fates, are likely to turn to lawyers and legal scholars for answers about the impact of the new climate-change regime on their livelihoods.

This article aims to contribute to the small but emerging field that synthesises the usually disparate fields of environmental law and labour law by identifying the key legal challenges and opportunities that are happening now, and are likely to arise in employment law under the new climate change regime. Part I looks at the idea of "Just Transition", a vexed concept that the current Government has declared a commitment to, and yet seems confused about what it is and how to apply it. This section will also examine the adopted Climate Change Response (Zero Carbon) Amendment and its relationship to Just Transition and its expected impact in labour relations. Part II is this author's regulatory impact analysis of climate change issues on essential areas of the New Zealand employment legislation and it identifies several problematic deficiencies needing immediate legal attention. Part III considers the role of the key actors in the employment field, what actions they can and are taking around raising awareness and advocating or litigating climate-employment issues.

It is not the purpose of this article to cover all the features of the future of work, such as the risk of automation (though undoubtedly much of what is raised here is applicable) nor would it be possible to cover all of the countless intractable problems arising at the intersection of climate change and labour relations.

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[1] Isaac Davison "Prime Minister Jacinda Ardern bans oil exploration" *The New Zealand Herald* (online ed, Auckland, 12 April 2018).

II. Just Transition

The 2015 Paris Agreement preamble states that the signatory parties to the agreement are those that take "into account the imperatives of a Just Transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities".[2] The question of what is meant by Just Transition has a seemingly straightforward answer about creating 'decent work" and "quality jobs", yet, on deeper analysis, it is an incredibly vexed issue, due to the various meanings attached to and operated on by different stakeholders in climate change thinking. While there is some historical truth and international legal consensus identifying it as an exclusive trade union project of protecting employees from the worst effects of any large-scale industry transition, modern understandings are far more expansive and have very different sets of goals and processes.

That said, despite the large-scale expected interference in work, work processes and labour markets arising from environmental changes and adaptation or mitigation responses to climate change, there has been little movement from legal practitioners in either environmental or employment fields to advocate, litigate or bring attention to potential disputes and issues that may arise under the new climate change regime.[3] In response, there is an emerging exploration of the intersection of environmental and labour market regulations, including one Canadian legal academic who proposes a new legal discipline of "Just Transition Law" to refer to advocacy and litigation occurring in this space.[4]

So far in New Zealand, Just Transition is something that is being considered by the current Government, most notably in the form of the Just Transition Hub (JTH) under the umbrella of the Ministry of Business, Innovation and Employment. In 2019, the Government also held the Just Transition Summit in New Plymouth as a way to engage affected stakeholders from the Taranaki oil and gas permit ban and to facilitate discussion around the Government's commitment to a low-emission future.[5] Arguably, there are also some minor (albeit indirect) elements of Just Transition in the Climate Change Response (Zero Carbon) Amendment Act 2019 (ZCA).[6]

It is legally relevant to critically examine what is happening in this area because both the Summit and especially the JTH, under the heading of Just Transition, are the nexus of climate change and employment issues from which future policy and legal developments in New Zealand will arise.

To guide thinking in this area, *Mapping Just Transition(s) to a Low-Carbon World* by the Just Transition Research Collaborative is an incredibly useful resource. Its authors identify four different and distinct approaches to Just Transitions namely: a "Status-quo" approach; a "Managerial reform" approach; a "Structural reform" approach and a "Transformative" approach.[7] The point of delineation between each approach is how narrow or expansive each view takes as to *whom* would be the focus of Just Transition policies and what changes would be necessary to

[2] The Paris Agreement [Paris Agreement] (opened for signature 22 April 2016, entered into force 4 November 2016) at Preamble.
[3] Ania Zbyszewska "Labor Law for a Warming World: Exploring the Intersections of a Work Regulation and Environmental Sustainability: An Introduction" (2018) 40 Comp Lab L & Poly J 1 at 2.
[4] David J Doorey "A Law of Just Transitions?: Putting Labor Law to Work on Climate Change" (2016) Osgoode Legal Studies Research Paper Series 164 at 5.
[5] Just Transition Hub "About the Just Transition Summit" Just Transition Summit <www.justtransitionsummit.nz>.
[6] Climate Change Response (Zero Carbon) Amendment Act 2019.
[7] Just Transition Research Collaborative *Mapping Just Transition(s) to a Low-Carbon World* (United Nations Research Institute for Social Development, 28 November 2018) at 12–15.

achieve a successful Just Transition for that designated group.[8] For example, a Status-quo Just Transition is one where corporations and "green investment" take the lead in providing replacement jobs in an impacted region after a government creates a market for such investment and possible liberalisation of labour laws.[9]

On the other end of the spectrum, a Transformative Just Transition proposes a complete overhaul of current political and economic systems and attempts to resolve, not just labour issues, but all social and cultural inequalities as the only acceptable solution in transition. Regardless of the respective merits of each of the approaches, the point is simply that Just Transition does not have a unique or broadly accepted understanding, something which, if not clearly defined or decided upon from the outset by policy-makers, can lead to contradictory, vague and frustrated low-carbon transition plans.

A. A Just Transition Hub for Everyone and for No One

This author's view is that the JTH has a concerning problem in that it has defined Just Transition for itself in a very mixed, if not confused, way by attempting to incorporate each of the four approaches mentioned above and, as a policy-maker, it is setting itself up for conflicts and doomed transition planning by trying to include different and disparate stakeholders while also promising different methods that are radically contradictory to each other.

For example, the JTH identifies that Just Transition is about a partnership with "Māori/iwi, local government, business, communities and the workforce to identify, create and support new opportunities, new jobs, new skills and new investments".[10] By trying to treat these groups equally and work with them all at the same time, it is failing to account for zero-sum game conflicts, where one possible transition proposal will be opposed to, if not negatively impact, one or more of the other groups. A foreseeable example would be a plan to redeploy labourers into energy-efficient home insulation or solar-panel home installation schemes yet, in order to allow for the capacity and speed necessary for such large-scale supply of the materials, specific safety standards will need to be relaxed which ultimately could injure the labourers. Incredibly, this has already occurred in Australia, where four young electricians died from fires caused by faulty home insulation under a Federal Government transition scheme, which was ultimately abandoned following the deaths.[11]

Likewise, the ambition for a transformative economy "that is more productive, sustainable and inclusive" raises the question of to what extent can those three elements equally co-exist with each other?[12] A transformative approach of Just Transition would argue that it is impossible to have both a productive and inclusive economy, given that a modern capitalist economy necessarily creates inequalities for the sake of profitability.[13] Inversely, a Status-quo approach would argue that the market and investment is key to creating new green jobs to replace old high-emission ones and would likely expect necessary liberalisation of employment or health and safety regulations in order to attract said investment, yet would inevitably depreciate the quality and safety of these new jobs.

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[8] At 28–29.
[9] At 28.
[10] Cabinet Paper "Just Transition to a Low Emissions Economy: Strategic discussion" (12 April 2018) Ministry of Business, Innovation and Employment <www.mibie.govt.nz> at Annex 2.
[11] Darryn Snell and Peter Fairbrother "Unions as environmental actors" (2010) 16(3) Transfer: European Review of Labour and Research 411 at 417.
[12] Cabinet Paper, above n 10, at Annex 2.
[13] Just Transition Research Collaborative, above n 7, at 29.

The JTH states that its aware of distributional impacts of change and seeks to maximise the net benefits of transition across New Zealand regions.[14] Geography is a particularly troublesome issue because the current attention, investment and consultation happening now in the Taranaki region is unlikely to be replicated at the same level elsewhere in New Zealand, in those communities that, like Taranaki, are equally dependent on carbon-intensive or high CO_2-emitting extractive industries (such as the West Coast of the South Island).

The odd thing is that the JTH is aware that transitions to a low-carbon future will result in inevitable costs and unequal outcomes between many sectors and individuals.[15] Nevertheless, from the available literature about what the JTH is and what it plans to do, it does not seem to be willing to plan for, or at least be honest about this reality.

Perhaps, given that it is a relatively new organisation, the JTH may currently be working on trying to answer these issues, yet, without a clear understanding from the start about who and what is not going to be included in Just Transition, this may result in an uncertain policy and ineffective transition plans.

B. The Zero Carbon Act and Just Transition

Save for one vague mention of "a just and inclusive society" in the Explanatory Note there is no reference to "Just Transition" anywhere in the proposed operative section of the ZCA.[16] This did not go unnoticed during the public submission stage of the Bill; and several submissions declared their support for its inclusion, some envisioning it as part of the s 4 Purpose provisions.[17] That said, there are five areas in the ZCA relating to matters for which the Commission or the Minister must take into consideration that are promising steps towards Just Transition thinking. All five provisions inter alia require reference to or consideration of social and economic impacts as well as distributional impacts in terms of background expertise of appointments of Commissioners, adopted technology, considerations in setting emissions budgets, national risk assessments and national adaptation plans.[18] While there are no explicit references to employment issues or "Just Transition", considerations of social, economic and distributional matters are undoubtedly going to deal with employment changes and labour-market risks in both mitigation and adaptation proposals.

However, there are two queries around this area of the ZCA. First, there is no hierarchy of these matters and no provisions for how the Commission/Minister would balance or qualify each of the matters against each other. Social, economic and distributional factors are not the only matters to be looked at, and the question, then, is: how would the Commission or Minister be able to decide how to proceed when there may be zero-sum gains and losses amongst all the matters under a proposal? For example, in s 5Z(2), a proposed emissions budget may have little or no adverse outcomes in 10 out of the 11 matters, yet the remaining matter would have a profoundly negative impact. Would the Commission then scrap that proposed budget to start again, or would it proceed on a majoritarian basis and accept the negative impacts?

[14] Just Transitions Unit "Just Transitions Academic Round Table Key Themes" (Just Transitions Unit Roundtable, Wellington, September 2018) at 2.
[15] At 4.
[16] Zero Carbon Amendment Bill, Explanatory Note.
[17] See for example Generation Zero "Public Consultation Submission on the Zero Carbon Bill" (Ministry for the Environment, 09944-Generation Zero, 2018) at 11.
[18] Zero Carbon Amendment Bill, ss 5H, 5L, 5ZN and 5ZQ.

Secondly, what options are there for those from the labour relations space to intervene or challenge an emissions budget, risk assessment or adaptation plan? Assuming that a proposed emission budget would lead to significant job losses in a particular region, what if this decision arose from the Commission, taking a narrow and labour-exclusive interpretation of the respective provisions? Or what if the Commission did consider employment issues but decided to proceed despite the evident harms? In this case, the Commission would have discharged its statutory duties in "referring" to the matter, but it is not obligated to cancel or modify that proposal, even if the specific matter had adverse outcomes.

The only solution possible would be an actor from the employment space, a trade union, business or an individual employee to raise a Judicial Review claim against the Commission or Minister for ignoring relevant employment concerns or proposals falling outside of a "Just Transition" standard. However, without "Just Transition" being mentioned in the operative section of the ZCA, it is unclear to what extent this challenge would be successful.

III. A Climate Change Regulatory Analysis for Employment Legislation

This section will be split into two parts. The first dealing with likely areas of legal dispute arising under climate change in three key employment statutes and fields of law that fall under the heading of employment-centric legislation. Those being the Employment Relations Act 2000 (ERA), the Health and Safety at Work Act 2015 (HSA) and the Accident Compensation Act 2001 (ACA). The second section looks at current and future legal strategies by employment stakeholders in the face of climate change.

A. Application to the Employment Relations Act 2000

Under the new climate change regime, an obvious and inevitable area of dispute under the ERA is likely to arise around redundancy, restructuring and compensation for loss of work. There are several legal issues already existing in this area of law which will be amplified by the new climate change regime.

The first area to examine is the re-focussing of existing roles under the climate change regime. It is expected that a number of existing jobs, especially those in the existing fossil-fuel industry, will not necessarily be made redundant as much as they will be realigned, in terms of changing work duties, requiring different skills, as well as changes in hours and location. In some of these roles, it may be the case that an existing position is to be substantially altered, yet the employer wishes to retain the existing employee in that role. Take for example, a Field Machinist currently employed on an off-shore oil rig, specifically working on drill machining and maintenance. The oil company, in line with company change in direction to green energy, wishes to re-deploy this worker into blade machining and maintenance for a planned wind turbine.

The issue here is, at what point can a role be re-focussed or altered so much that it amounts to unintended cancellation of the existing employment contract and effective redundancy? In *Howard v New Zealand Pastoral,* it was held that there is no redundancy where there is a new job created with a different focus but remained substantially similar to the old role.[19]

[19] *Howard v New Zealand Pastoral Agricultural Research Institute Ltd* [1999] 2 ERNZ 479 (EC).

The ERA does not define redundancy, nor does it offer much in the way of statutory protection for redundant employees.[20] As such, employment cases must rely on the relevant contract to define a redundancy event which raises an additional problem in that, because the definition of redundancy is not clearly defined, confusion by all parties could occur when existing roles are modified to be more climate-aligned. These types of disputes would undoubtedly be fact-driven, but then there remains the issue of what "substantially similar" means.

The second area of interest considers personal grievance for unjustified termination via redundancy under s 103A ERA by a business in a transition scenario. The authority of *Grace Team Accounting v Brake* holds that a Court is permitted to inquire into business decisions about redundancy to ascertain if it falls below what a "fair and reasonable employer" would have done.[21] However, the Court will not go so far as to substitute its view for the subjective business judgment of the employer.[22] The question, here, is how far can the ratio of *Grace Town Accounting* be pushed, for example where the Government decides to provide financial assistance and support packages for an affected region? Say a shopkeeper in New Plymouth makes an employee redundant due to declining business and restricted imports but is the only shopkeeper in the region to do so because the others have taken up the Government offer of subsidies or re-training schemes. In this case, it would be arguable to find the action substandard but, what if in the same scenario, only half of the businesses in the region took up the offer of government support? Or what if the impugned business took up some parts of an offered support package but rejected other assistance which could have prevented the redundancy?

The point here is that the fair and reasonable standard will likely now need to factor in broader governmental economic strategy and plans, given the predicted widespread and regional needs under the new regime and the necessity to meet the 2050 emission reduction targets. That said, it is open at this stage to question how this fair and reasonable employer standard could be consistently applied by the Tribunal or courts when faced with a multitude of disparate regional, economical and work cases where personal grievance is claimed over redundancy dismissals. It would be an inconsistent outcome if courts were to find one dismissal unjustified for a large uptake of government support in one part of country and find the converse in another part of country, where no support was offered but the redundancy was still caused by the change in commercial viability triggered by the new regime.

The third area of dispute is around redundancy compensation. Under the ERA, compensation for redundancy is not a statutory obligation and, where it is absent from a contract, the current case law position affirms the primacy of contract and that it is not the place of the courts to add terms like compensation into it.[23] Further, even where compensation was a contractual term, in cases where a company goes into liquidation, a possibility where the business model collapses under the new climate change regime, compensation owed to employees is ninth on the priority list of preferential creditors' claims, which could easily result in many employees not getting the full amount, if any at all, of the compensation owed.[24]

The prospect of large-scale impoverishment following climate-related redundancies is a key worry, and yet there is no indication by the Government of addressing this deficiency.

[20] Richard Rudman *New Zealand Employment Law Guide* (Wolters Kluwer, Auckland, 2018) at 407.
[21] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2014] ERNZ 129 at [94].
[22] *G N Hale & Son Ltd v Wellington Caretakers IUW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA) at 157–158.
[23] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA).
[24] Companies Act 2003, sch 7(1).

B. Health and Safety at Work, ACC Cover and Climate Change

The next regulatory impact analysis explores how well-placed New Zealand's health and safety regulations, as well as the ACC scheme, are to deal with the above scenarios in the workplace. Adverse impacts of climate change on the working environment and workers are predicted to be numerous such as: heat stress;[25] reduced air quality;[26] and increased exposure to vector-borne diseases.[27]

Conversely, there are also unique hazards to workers arising from renewable energy and "green" industries, such as increased concentrations of carcinogenic radon arising from efficiency insulation in buildings;[28] fire and explosion risks of hydrogen transportation, storage and use;[29] exposure to toxic chemicals, such as cadmium – a known carcinogen, during solar panel manufacture, disposal and recycling;[30] and carbon capture and storage (CCS), exposing workers to highly toxic concentrations of CO_2 leading to acute respiratory and central nervous system illnesses.[31]

The key legal stressor for the HSW is to what extent are climate-related environmental and occupational harms capable of being foreseeable risks to health and safety and, if foreseeable, in what ways such a risk be "reasonably practicable" to eliminate or minimise by the duty holder?[32]

For example, one of the predicted climate-related harms will be heat-stress, which will impact outdoor workers, such as fruit-pickers or construction workers.[33] In this scenario, the heat-stress harm on outdoor workers in high temperatures is capable of being identified as a "reasonably foreseeable hazard" under HSW Regulations.[34]

However, in these types of work, being outdoors for extended periods is integral to the commercial efficacy and reality of the business. Since elimination of the risk would be impossible, the only option is minimising the risk, yet regularly keeping workers inside or avoiding going outside during the day or other such measures could become so detrimental to the business, especially in time-sensitive fruit-picking or building industries, that the business owner could escape liability under a "grossly disproportionate" cost defence despite the manifest suffering of their workers.[35] Further, some outdoor workers may be obligated to wear personal protective equipment under the HSW Regulations, but this would likely add to the heat-stress of the affected worker.[36]

In terms of ACC cover, there will be a need to update the ACA in order to reflect the nature of

[25] Max Kiefer and others "Worker health and safety and climate change in the Americas: Issues and research needs" (2016) Rev Panam Salud Pública 40(3) 192 at 193.
[26] At 194.
[27] At 194.
[28] Kevin Walls, Geza Benke and Simon Kingham "Potential increased radon exposure due to greater building energy-efficiency for climate change mitigation" (2014) Air Quality and Climate Change 48(1) 16.
[29] Health and Safety Executive "Health and safety in the new energy economy: Meeting the challenge of major change" (15 December 2010) HSE <www.hse.gov.uk> at 11.
[30] At 13.
[31] At 13.
[32] Health and Safety at Work Act 2015, ss 22 and 36.
[33] Kiefer, above n 25, at 193–194.
[34] Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, cl 5.
[35] Health and Safety at Work Act 2015, s 22(e)
[36] Health and Safety at Work Regulations, cl 18.

injuries that may arise from adverse environmental impacts to workers. For example, in terms of mental injuries for emergency responders to natural disasters, the ACA will cover one single traumatic event.[37] However, inconsistently, it will not cover many yet smaller stressors that amount to gradual mental injury, something that is more likely due to increased workload and the challenging nature of the natural disaster response.[38]

The rise of new green technologies may result in unique types of chemicals or processes not yet seen in New Zealand workplaces, are either known but not statutorily accepted risks, or are of such an experimental level that there is not yet a medical understanding of the possible harms. As such, sch 2 of the ACA needs to be immediately updated in light of hydrogen production and fuel-cell technology being planned for Taranaki to cover possible gradual exposure injuries, as well as Parliament amending the ACA to allow for more flexible and immediate additions to the sch 2 list instead of additions being via the normal legislative process.[39]

C. Employment Actors and Future Climate-Employment Legal Strategy.

This section will explore the current employment strategies that are presently available to both employers and employees under the current legal regime as well as set out future developments arising from the interface between employment law and climate change.

i. Changing role of trade unions overseas

Overseas, there is evidence of a trend of trade unions moving beyond the usual industrial disputes over wages or conditions to now also organising, researching, litigating and negotiating around climate change. For example, a number of overseas trade unions have begun to adopt so-call "climate-bargaining" strategies where climate terms feature as part of employment agreements and workplace policy.[40] In one such collective agreement, the Australian National Tertiary Education Union bargained for a specific clause that implemented specific workplace environmental actions.[41] Of particular note is the Minneapolis-based SEIU Local 26 which undertook the strategy of "packaged" collective bargaining, whereby conventional issues of wages, hours and working conditions were proposed *in addition* to green demands, such as the creation of a "green" janitorial training programme and closure of the local rubbish incinerator used by the union's cleaning workers.[42] As of February this year (2020), union members went on strike over the breakdown of negotiations, citing, inter alia, the employer's refusal to accept their green proposals, an action that appears to be the first union strike over climate change issues in the United States.[43]

An example of legal intervention by a trade union is the California-based Southwest Carpenters challenging a number of local city planning decisions approving large-scale developments for inadequate environmental impact analysis including, among other things, greenhouse gas emissions.[44] Additionally, the AFL-CIO and Communications Workers of America filed a Federal

[37] Accident Compensation Act 2001, s 21B.
[38] Kiefer, above n 25, Table 1, at 193.
[39] Accident Compensation Act, sch 2.
[40] Snell and Fairbrother, above n 11, at 412.
[41] Federation University Australia Union Collective Agreement (UCA) 2015–2018 Federation University <www.federationuniversity.edu.au> at 81.2.4.
[42] "SEIU Local 26 Janitorial Bargaining Update #3" SEIU Local 26 <www.seiu26.org>.
[43] Jeremy Brecher "First US-Authorized Climate Strike?" (29 February 2020) Labor Network for Sustainability <www.labor4sustainability.org>.
[44] Letter from Witter Parkin LLP (representing the Southwest Regional Council of Carpenters) to Jamie Murillo

Court complaint in 2017 challenging a deregulation Executive Order by President Trump, where one such consequence of the Order would be to unlawfully undermine the Environmental Protection Agency's statutory duty to promote regulations controlling greenhouse gas emissions.[45]

In the United Kingdom, the Government has financed initiatives bringing trade unions, employers and employees together to create voluntary joint worksite committees to develop and self monitor green efficiency plans at work.[46] An example of this is when public services union, UNISON, successfully negotiated an agreement with the Stockport Metropolitan Council which commits both parties to work together to reduce the high-carbon footprint caused by Council public work activities; for all staff to be educated about climate change; opportunities to give feedback or proposals on sustainability proposals in the workplace; to allow for green workplace internal and external audits and for the creation of "union environmental reps" to promote and engage with the employer on green issues.[47]

Compared to overseas counterparts, climate-facing activity of New Zealand trade union movement is more limited. A study of 11 New Zealand Council of Trade Unions (NZCTU) affiliated unions revealed only two had developed basic climate-facing policies, with the remaining nine either inactive or non-committal to developing such policies, with seemingly little interest being raised by the membership.[48] Whether the NZCTU or local unions in New Zealand take further action beyond such policy discussions and lobbying remains to be seen, but the overseas examples mentioned have not left them wanting for ideas for escalated climate strategies and opportunities.

ii. Scope of "green industrial action" under the ERA

Industrial action remains an effective strategy, if not the most visible, of employment actors to force or change a specific issue, either generally or in relation to the other employment actors. Under the scope of the ERA, there are three identifiable lawful "green industrial actions" that are available for employment relationship stakeholders to bring attention to climate change or compel the other parties in favour of broader environmental issues.

The first action is "green-ban" strike action undertaken by a trade union and its member-workers. This type of action was an innovation of 1970s Australian trade unions where, subsequent to lobbying from local environmentalists, the union would direct workers to down tools on a proposed development project, effectively stopping the project, amounting to an industrial version of a court-ordered injunction.[49]

Currently under the ERA, a "green-ban" in this style is more or less illegal, unless it takes place in

(Senior Planner for City of Newport Beach) regarding Newport Crossings Mixed Use Project Draft Environmental Impact Report (PA2017-017) (14 January 2019) at 239. See also Hillary Davis "Labor union environmental appeal targets Newport apartment project" *LA Times – DailyPilot* (online ed, Los Angeles, 29 March 2019).

[45] *Public Citizen, Inc v Trump* "Memorandum Opinion" Case 1:17-cv-00253 Document 1 (DDC 2019) 41 at 117.

[46] Snell and Fairbrother, above n 11, at 413.

[47] Stockport Council and Stockport LG UNISON *Joint Environment and Climate Change Agreement* (3 May 2016) Stockport Metropolitan Borough Council <stockport.gov.uk>.

[48] Julie Douglas and Peter McGhee "Trade unions and the climate change fight" (5 July 2016) Briefing Papers <www.briefingpapers.co.nz.>.

[49] Verity Burgmann "The Green Bans Movement: Workers' Power and Ecological Radicalism in Australia in the 1970s" (2008) Journal for the Study of Radicalism 2(1) 63 at 65 and 81.

limited scope collective bargaining negotiations or on the grounds of health and safety.[50] Since the ERA does not exclude environmental issues from collective bargaining, it is entirely possible that climate change concerns form part of a package of demands in collective bargaining. For example, a trucking industry trade union could demand that the company and its drivers discontinue transporting fossil-fuel cargo in addition to other "bread and butter" issues during a renegotiation of the collective agreement. As long as the other provisions of s 86 ERA are complied with, this would be a perfectly legal green-ban.[51]

The second type of action is the converse of the first, but on the employers' side, where they could action a "green-lockout". While there is no history of this occurring, it is quite possible for employers to legally engage in a green-lockout pursuant to the relevant lockout provisions of the ERA.[52] For example, an employer could lock out their employees, or even aid another employer to compel a reluctant or protectionist trade union to accept progressive environmental terms, such as climate change mitigation/adaptation measures in the collective agreement. Such a green-lockout in the face of uncooperative employees is increasing in risk, especially where there is a trend towards heightened investor and community pressures on company directors to develop corporate strategies to set or improve low-emissions targets and other mitigation measures.[53]

The third type of green industrial action is on health and safety grounds, something available to both employees to strike for, or employers to lock out over, under the ERA and the HSW.[54] This action would arise, for example, if there is a particularly harmful chemical or dangerous process used. It cannot be ignored that much of fossil-fuel extractive work by its nature is highly dangerous, the disaster at Pike River coal mine comes to mind, so s 84 of the ERA is a possible avenue for fossil-fuel industry employees to both remedy the immediate harms of their workplace, as well as place pressure on their employer to begin a low-carbon industry transition.

It is worth noting the high school students around the globe who have begun taking "strike" action in protest of climate change. While not occurring in the context of employment relations and thus not a true industrial action, the principle of a strike remains the same – a group that willingly refuses to or absent themselves from their designated activity in order to pressure or advocate a specific issue. Also worth noting is that a number of trade unions, including New Zealand ones, supported the school strikes and, where possible, members attended the strike in solidarity.[55]

iii. Human rights

The last area to examine is noting that an individual employee's belief towards climate change is now likely a relevant consideration in employment discrimination circumstances. While there are no cases in New Zealand on the issue, the United Kingdom decision in *Grainger plc v Nicholson* would likely be mostly persuasive, given the similar subject matter and the precise legal analysis

[50] Employment Relations Act 2000, s 81.
[51] Section 86.
[52] Section 82.
[53] Noel Hutley and Sebastian Davis *Climate Change and Directors' Duties* (The Centre for Policy Development, Supplementary Memorandum of Opinion, March 2019) at 5.
[54] Employment Relations Act, s 84; and Health and Safety at Work, s 83
[55] See for example Huia Welton "NZCTU Supports Climate Strike" (press release, 13 March 2019); Public Service Association "Strong support for School Strike for Climate from PSA" (press release, 13 March 2019); and International Trade Union Confederation "Students strike for the jobs of tomorrow" (press release, 14 March 2019).

of what amounts to an ethical belief.[56] In this case, Judge Burton held that Mr Nicholson's belief in human-made climate change, under a five-point criteria, amounted to an ethical belief protected under the English human-rights legislation Therefore, it was discriminatory to single him out for redundancy on the basis of his beliefs.[57] In the New Zealand context, such a case could be either brought as a personal grievance under the ERA or before the Human Rights Tribunal as a s 22 complaint under the Human Rights Act 1993.[58]

In light of growing public awareness and individual commitments to fighting climate change, this additional dimension of employee's personal beliefs and attitudes towards climate change now needs to be carefully considered by employers when making labour decisions.

IV. Conclusion

In the face of climate change, many jobs and entire industries will disappear while others will be created and expanded. Such a transition will undoubtedly impact on the employment space. The above analysis is something the author hopes will start a synthesis of environmental and employment law, and that lawyers and scholars in those respective fields no longer work in silos, but start considering the real and unavoidable role climate change will play in the world of work. Being literate in this area is crucial in order to understand the real deficiencies in the Just Transition thinking by the current New Zealand Government, and to help illuminate the many and varied challenges and opportunities that climate change will bring on employment. It is also clear that the old "jobs versus environment" dichotomy is no longer true, with the rise and possible leadership of employment parties to, both, address and solve climate change issues.

[56] *Grainger plc v Nicholson* [2010] 2 All ER 253 (EAT).
[57] At [24].
[58] Human Rights Act 1993